Journal of Civil Law Studies

Volume 9
Number 1 *Conference Papers*
*The Louisiana Civil Code Translation Project: Enhancing Visibility and Promoting the Civil Law in English*
*Baton Rouge, April 10 and 11, 2014*
*Part 1. Translation Theory and Louisiana Perspectives*

Article 10

10-27-2016

# The Louisiana Civil Code Translation Project:A Libertarian View on the Possible Destinyof a Trilingual "Footnote"

François-Xavier Licari

# THE LOUISIANA CIVIL CODE TRANSLATION PROJECT: A LIBERTARIAN VIEW ON THE POSSIBLE DESTINY OF A TRILINGUAL "FOOTNOTE"

François-Xavier Licari*



Almost twenty years ago, as I was a doctoral student in Strasbourg, France, I had the privilege to follow a course by Professor Shael Herman, who taught an Introduction to the Uniform Commercial Code (UCC). In passing, he could not resist to evoke his beloved "footnote." What he called the "footnote" was Louisiana law: he explained that in American law books one often finds footnotes like "except in Louisiana;" "as for Louisiana, see …," and so on.[1] He painted us a vivid portrait of the Romanesque genesis of Louisiana civil law; he celebrated its Frenchness and its hybridity, in a word: its fascinating singularity; he made us love the intellectual jewel that it is. Since that time, my passion for Louisiana law has never decreased. I am more than delighted to explore today another one of its facets.

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* Associate Professor, Institut François Gény, University of Lorraine, France.

1. Comp. Shael Herman, *Apologia for a Footnote*, 7 TUL. CIV. L.F. 187 (1992) 187.

## I. INTRODUCTION: THREE GOALS

In the course of this lecture, I will address a herculean task undertaken by Prof. Moréteau and the Center of Civil Law Studies of LSU: "The Louisiana Civil Code Translation Project." They have translated the present version of the Louisiana Civil Code (La. C.C.) in French, so that now the Louisiana Civil Code exists again in its original language. A Spanish translation is also envisaged. This bilingual, and in the future trilingual, "footnote" is accessible online, a ubiquity that assures a maximal diffusion.[2]

One may wonder about the purpose of such an undertaking. Sylvie Monjean-Decaudin has already highlighted the different purposes of code translation in general.[3] To understand the motives of the translation of the La. C.C. in particular, let's take a look at the project description, "The Louisiana Civil Code Translation Project: An Introduction."[4] It reveals that the aim of this translation is threefold.

Firstly, "the translation project will make the Civil Code available to Francophone Louisianans" and, consequently, contribute to the promotion of the linguistic rights of this minority, disdained by a legislature that "may have forgotten that civil codes are drafted for citizens …."[5]

Secondly, the Louisiana Civil Code is viewed as an alternative model that may facilitate law reform in mixed jurisdictions that have a civil code inspired from the Napoleonic Code.

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2. https://www.law.lsu.edu/clo/louisiana-civil-code-online/.

3. *See* Sylvie Monjean-Decaudin, *Pourquoi traduire un code, hier, et aujourd'hui ?*, in this same volume of the J. CIV. L. STUD.; *See also* Olivier Cachard, *Translating the French Civil Code: Politics, Linguistics and Legislation*, 21 CONN. J. INT'L. L. 41 (2005).

4. Olivier Moréteau, *The Louisiana Civil Code Translation Project: An Introduction* 5 J. CIV. L. STUD. 97 (2012); *See also* Olivier Moréteau, *Le Code civil de Louisiane en Français : traduction et retraduction*, 28 INT J. SEMIOT. LAW 155 (2015).

5. *Id.* at 98.

Thirdly, it is suggested that the Civil Code of Louisiana could serve as a model for civil law countries as well: "Overall, the translated civil code should serve as a guide for law reform, in civil law countries trying to bridge the divide with common law systems. This is the case of most Member States of the European Union …."[6]

We would have expected a fourth goal: The Louisiana Civil Code as *chevalier blanc* entering the European Civil Code tournament.[7] But Prof. Olivier Moréteau thinks that Europeans do not need a European Civil Code. He is a partisan of pluralism and diversity.[8]

I think the Louisiana Civil Code could have an influence on European law, depending on the point of view we adopt. If we limit ourselves to the traditional national codification, as a model, the Louisiana Civil Code has a very limited chance of success. But, if we adopt a broader view and consider the law as a global market and the Louisiana Civil Code as a highly marketable product, we have good reasons to be optimistic.

## II. THE LOUISIANA CIVIL CODE AS THE EUROPEAN CIVIL CODE?

In Louisiana, you are probably not aware of what a British scholar teaching in France labeled a "game of cat and mouse."[9] A rather vicious game, where the leading member states attempt—with a variable skillfulness—to place their own codification on the

6. *Id.*

7. In European parlance, the future (?) European Civil Code bears the less elegant name of "Common Frame of Reference:" Martinj W. Hesselink, *The Common Frame of Reference As a Source of European Private Law*, 83 TUL. L. REV. 919 (2009); THE POLITICS OF THE COMMON FRAME OF REFERENCE (Alessandro Somma ed. 2009); now, the EU has lowered its ambitions and concentrates on a unified sales law, the so called "Common European Sales Law" ('CESL'): EUROPEAN PERSPECTIVES ON EUROPEAN SALES LAW (Javier Plaza Penadés & Luz M. Martínez Velencoso eds. 2015).

8. Olivier Moréteau, *A Summary Reflection on the Future of Civil Codes in Europe* in FESTSCHRIFT FÜR HELMUT KOZIOL 1449, 1451 (Peter Apathy, Raimund Bollenberger et al. eds., Sramek, Vienna 2010).

9. Ruth Sefton-Green, *The DFCR, the* Avant-Projet Catala *and French Legal Scholars: A Story of Cat and Mouse?*, 12 EDIN. L.R. 351 (2008).

European exchequer. Not only is there a competition between different national projects and academic circles, but in France there is also a competition between different projects and persons. The latest French project is only a few months old, but for the first time it seems to have a chance to be realized.[10] All of its predecessors are now sleeping Beauties waiting for a Prince charming who will never come. If we focus on the French attitude towards a European codification, it is very simple to sum up. In the words of Ralf Michaels: "Where a European Code threatens to replace the code civil with something different, it must be opposed. Where, by contrast, the code civil is allowed to become a European Code …, Europeanization is supported."[11]

The same could be said about almost each European country. Probably because the majority of scholars, to which I belong, is not convinced by such an endeavor. First, and very simply, I am not sure that we really need such a code. The American example amply demonstrates that the multiplicity of laws is not an impediment to a dynamic interior market. Why not continue to brew European law in microbreweries? What Shael Herman writes for American law is transposable to the European situation:

> Like microbreweries producing their distinctive ales and beers, the various state judiciaries … construe enactments of their coordinate legislatures and produce case law …. But by

10. PROJET DE RÉFORME DU DROIT DES CONTRATS, DU RÉGIME GÉNÉRAL ET DE LA PREUVE DES OBLIGATIONS, RENDU PUBLIC LE 25 FÉVRIER 2015, with a commentary from Nicolas Dissaux & Christophe Jamin (Dalloz 2015); Cécile Chabas, *Commentaire de l'avant-projet de réforme du régime général des obligations*, 113 REVUE LAMY DROIT CIVIL 105 (2014). In the meanwhile, the much awaited new law of obligations saw the light : Ordonnance 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations [Ordonnance 2016-131 of February 10, 2016 on the Reform of Contract Law, of Obligations in general and of Proof of Obligations] *Journal officiel de la République française* [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 11, 2016; see M. Mekki, *The General Principles of Contract Law in the "Ordonnance" on the Reform of Contract Law*, 76 LA. L. REV. 1193 (2016).

11. Ralf Michaels, *Code vs. Code: Nationalist and Internationalist Images of the Code civil in the French Resistance to a European Codification*, 8 EUROPEAN REVIEW OF CONTRACT LAW 277 (2012).

> definition, these different case-products are at best only persuasive for neighboring states who chauvinistically vouch for their own domestic products. As in beer so in commercial law. Strength resides in diversity. E pluribus unum.[12]

Secondly, I really wonder why we should "bridge the divide" between common law and civil law in Europe. I cannot agree more with Mauro Bussani:

> Why should any European codification effort pay a time- and energy-consuming tribute to the search for a compromise between continental and common law solutions? Why should this effort be carried on with a counterparty—the United Kingdom—that … has always kept it self as a distance from the most significant milestones of the European Union institutional story …? Why should the continental tradition not rely merely and deliberately on itself to strengthen its own capacity for dialogue with the non-European world living on a civilian legacy in the Americas, in Africa and in Asia?[13]

Thirdly, a Code of obligations, or, *a fortiori*, a European civil code, doesn't seem to *still* be the right way to legislate. Why? Because the post-modern man (or woman) aspires to *justified* law; he or she is reluctant towards the *apodictic* nature of codes, or, more generally, of statutory law. In our post-modern, multicultural and

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12. S. Herman, *Competition in the Land of Microbreweries: Managing Multistate Transactions in the United States*, 5 TUL. J. INT'L & COMP. L. 351, 355 (1997); *see*, in the same vein, Alain A. Levasseur, *"Réponse Louisianaise"* in *Réponse de la Fondation pour le droit continental*, REVUE DES CONTRATS 1376 (2011): "*Les deux cents ans de coexistence du Code civil louisianais, en langue anglaise, avec la common law de quarante-neuf États sur un même continent ne semblent pas conduire à la conclusion que l'unification du 'droit privé' soit une nécessité sur ce continent*."

13. Mauro Bussani, *A Streetcar Named Desire: The European Civil Code in the Global Legal Order*, 83 TUL. L. REV. 1083, 1091 (2009). Levasseur *supra* note 12, expresses the same opinion in a more vigorous way:

> *Si je transpose le rapport 'Louisiane contre 49 États de common law' dans le cadre de l'Union européenne, il devient alors 'Grande-Bretagne-Irlande contre 23 (?), 24 (?), 25 (?) États continentaux civilistes'. Il me semble que ce rapport parle de lui-même ! Des 'compromis' avec la Grande-Bretagne devraient-ils conduire à une 'harmonisation' du droit du contrat (et non des contrats) de la civil law vers la common law ? À une harmonisation du droit de la vente de la civil law vers la common law ? Impensable !*

pluralistic society, women and men desire to choose the law that will govern them.[14] The liberty of choice is already big on the law market of the 21st century; it could be bigger in a libertarian society. Let's begin with a utopia and let's end with the reality, which is not that far from utopia.

## III. THE LOUISIANA CIVIL CODE IN THE LAW MARKET: UTOPIA AND REALITY

### *A. The Libertarian Utopia*

I am not sure that everyone here is familiar to the libertarian school of thought. As a matter of introduction, I will quote David Friedman's "The machinery of Freedom" (1973), one of the canonical books of anarcho-capitalism:

> The central idea of libertarianism is that people should be permitted to run their own lives as they wish. We totally reject the idea that people must be forcibly protected from themselves …. We also reject the idea that people have an enforceable claims on others, for anything else than being left alone.[15]

In a chapter dedicated to police, courts and laws, Friedman elaborates further on the dispensability of the state.[16] Police, courts and laws? On the market! As a way to solve the private law disputes, the path to a libertarian society would be the unlimited potential to resort to mediation and arbitration.[17] But you may ask, in such an anarchist society, who would make the laws? "The answer is that systems of law would be produced for profit on the open market just as books and bras are produced today."[18] There would be many private

14. JAN M. SMITS, PRIVATE LAW 2.0—ON THE ROLE OF PRIVATE ACTORS IN A POST-NATIONAL SOCIETY (Eleven Int'l Publishing 2011).

15. DAVID FRIEDMAN, THE MACHINERY OF FREEDOM—GUIDE TO A RADICAL CAPITALISM xiii (3rd ed. 2014) at XIII.

16. In fact, according to the libertarian thought, the State is not only dispensable, it is nefarious. A parasite. *See* MURRAY N. ROTHBARD, ANATOMY OF THE SATE (2009).

17. FRIEDMAN, *supra* note 15, at 110.

18. *Id.* at 112.

courts and a variety of legal systems. Each court would choose the most efficient law to settle disputes. Would that society be messy? I don't think so: even today, there is a lot of uncertainty; the law that applies to you sometimes depends on the country you live in; and sometimes, it depends on your nationality. Sometimes, it is purely accidental; remember the infamous *lex loci* delicti.[19] Of course, those who join the myth according to which uniformity is beautiful will object that Friedman's model is a dystopic regression. But, if the plurality of legal systems cohabiting in a territory is really problematic, "courts will have an economic incentive to adopt uniform law, just as papers companies have an incentive to produce standardized size of paper."[20] Basically, there would be a "competition among different brands of law, just as there is competition among different brands of cars."[21]

What will these "brands" of law be? As it is rather intellectually challenging to create a brand new legal framework *ex nihilo*, arbitration agencies will be in search of existing adaptable models. Whether such rules are efficient, they are familiar to the parties and they provide answers to most of the relevant questions. They therefore provide a potential point of initial agreement and can conduct further bargaining. The La. C.C. could be this point of initial agreement for any libertarian society which could get convinced by the charms of Louisiana civil law. I'll try to explain later why they should.

19. The rejection of the *lex loci delicti commissi* was one of the motives of the "American Choice-of-law Revolution." *See* Symeon. C. Symeonides, *The American Choice-of-Law Revolution in the Courts: Today and Tomorrow* 298 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONALE DE LA HAYE 448 (Brill 2002).

20. FRIEDMAN, *supra* note 15, at 116.

21. *Id.* at 112.

*B. The Law Market Hic et Nunc*

This utopia may remain nothing else than a utopia. Nevertheless, the "law market" is already there.[22] By "law market," I refer:

> to ways that governing laws can be chosen by people and firms rather than mandated by states. This choice is created by the mobility of at least some people, firms and assets and the incentives of at least some states to compete for people, firms and their assets by creating desired laws.[23]

One of the main sources of this law market is the possibility that people have to choose the law of another state. The party autonomy principle is cardinal in European private international law.[24] Let's remind us article 3 [Freedom of choice] of the 'Rome I Regulation': "A contract shall be governed by the law chosen by the parties …." Indeed, it's almost a universal principle.[25] Thus, the Louisiana rules regarding the law of obligations could be chosen by parties worldwide to govern a contract. Indeed, it is generally admitted that contract partners can even choose a "neutral law," a law that has no particular factual, geographical or legal relationship with the contract. In the same vein, international arbitration law offers a great freedom for parties to choose the applicable law.[26] Again, the parties are free to choose the law they wish, and again, they could choose Louisiana law of obligations. Yet, even though this principle exists

22. ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET (Oxford University Press 2009).

23. *Id.* Chapter 4, *in limine*.

24. For a critical approach, *see* Horatia Muir Watt, *"Party autonomy" in international contracts: from the making of a myth to the requirements of global governance*, 6 ERCL 250 (2010).

25. Russell J. Weintraub, *Functional Developments in Choice of Law for Contracts*, 187 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONALE DE LA HAYE 271 (Brill 1984).

26. Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of Its Country of Origin*, 30 INT'L & COMP. L.Q. 358 (1981); Rachel Engle, *Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability*, 15 TRANSNAT'L LAW. 323 (2002); Charles Chatterjee, *The Reality of the Party Autonomy Rule in International Arbitration*, 20 J. INT'L ARB. 539 (2003).

in international law, libertarian doctrine would suggest an extension of this rule to national legal relations.

At this stage, we can see that there is a great possible field for the success of the Louisiana Civil Code. But, what about the practice?

Why should Europe adopt such a model if a European civil code was to see the light? And why would contract partners choose Louisiana law if they have no special ties with civil law or a mixed jurisdiction?

Now, I will inquire if the La. C.C. is worth being adopted, be it by a legislature or by parties of a contract.

## IV. THE LOUISIANA CIVIL CODE IS AN ATTRACTIVE GOOD ON THE LAW MARKET

I believe that, in the competition between legal systems, the Louisiana Civil Code has an eminent role to play. Needless to say, some institutions of the Louisiana civil law are too culturally impregnated to be easily exported: family law, matrimonial regimes or succession law, for example. The two books that appear as very marketable are Book III and Book IV. Book III is entitled "On the different modes of acquiring the ownership of things." At its heart lies the law of obligations. Book IV deals with "Conflict of laws." These sets of rules are very attractive for at least three reasons.

First of all, both France and the E.U. are seeking for reforms and harmonization of their conflict of laws. Second, the law of obligations and the conflict of laws rules are relatively culturally neutral: they are largely based on Roman law, logical and guided by the respect of the legitimate expectations of the parties and on economic rationality.[27] They could then be useful for any arbitration agencies

27. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS—ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION *Preface* (Clarendon Press 1996); P.E. Nygh, *The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort*, 251 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONALE DE LA HAYE 279 (Brill 1995).

or legislature. And thirdly, the books on obligations and on conflicts of laws enclose many interesting innovations and original provisions, as I will try to illustrate at the end of this speech.

*A. Economically Efficient?*

In a society where law is a product and where people are free to choose their law, the good product should be an economically efficient one. This leads us to the haunting question of the efficacy of the civil law vis-à-vis the common law. In this field, the perspective is shadowy: legal economists contend that legal institutions stemming from the English common law offer superior institutions for economic development, as compared to those of the French civil law.[28] These authors give two main arguments. First, the common law system supplies more adequate rules for business transactions and financial markets; second, French private law assumes a too important place for state interventionism, which inhibits its economic effectiveness. But, what to think about mixed jurisdictions, and, especially, about Louisiana law? If common law is really beneficial to economic growth, the endurance of hybrid legal systems where private law belongs to the civil law tradition is perplexing. As we well know, common law neighbors exert a great pressure on the "footnote" (Louisiana law) to put it back in the main text (U.S. common law). Hence, there may be a good reason—and not solely a fierce chauvinism—why this footnote does not surrender, despite the discomfort of the bottom of the text. The vitality of the Louisiana Civil Code did not happen by chance. Darwinism, or at least common sense, teaches us that generally useless organisms tend to disappear.[29]

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28. For a critical account of these common places about the non-efficiency of the civil law, *see*: Nuno M. Garoupa & Andrew P. Morriss, *The Fable of the Codes: the Efficiency of the Common Law, Legal Origins, and Codification Movements*, 2012 U. ILL. L. REV., 1443 (2012).

29. Nuno M. Garoupa & Carlos Gomez Ligüerre, *The Efficiency of the Common Law: The Puzzle of Mixed legal families*, 29 WIS. INT'L L.J. 671 (2012).

But let's not take law and economics too seriously; at least because an important finding of law and economics research in the two last decades has been that the rationality assumption of the *homo economicus* is often overestimated, if not mistaken. In effect, economic agents are plagued with diverse cognitive limitations that bound their rationality. As an illustration, a recent empirical study showed that the reason why parties in international contract disputes preferred English law and Swiss law was far from crystal clear, and that the attractiveness of two very different contract laws in essence could be explained by a combination of extrinsic factors and intrinsic qualities of those contract laws.[30] The extrinsic factors are as various as the seats of the arbitration, the language in which the laws are available, the so-called "neutrality" of the chosen law, the model contracts, the influence of the global law firms and the colonial past. I will comment on two of them, the language and the neutrality.

Firstly: the language. Francophiles and francophones will see a provocation in my statement, but the main quality of the La. C.C. is that it is *American* and written in *English*. The American civilization has acquired a *de facto* leadership: English is a *lingua economica* and a *lingua academica*, if not the *lingua franca* of Europe and the world.[31] Most recently, several countries of continental Europe have admitted, or are discussing to admit, English as an optional court language.[32] Surprisingly enough, France belongs to these pioneer countries. Moreover, U.S. law(s) and U.S. law schools are prestigious; everywhere, we can observe a true reception of American

30. G. Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455 (2014).

31. Robert Phillipson, Lingua franca *or* lingua frankensteinia*? English in European Integration and Globalization*, 27 WORLD ENGLISHES 250 (2008).

32. Christoph A. Kern, *English as a Court Language in Continental Courts*, 5 ERASMUS L. REV. 187 (2012).

law,[33] even if its exact extent is subject to debate.[34] Willy-nilly, American English is the vernacular language of the 21st century, especially in the world of trade and international contracts,[35] even if linguists regularly warn us that legal English is not adapted to such contracts.[36] On the contrary, the Louisiana Civil Code offers civilian legal English, which is suited for international contracts between parties who do not belong to the common law world. It could also provide a common language for civilians in Europe.[37] But, if English dominates the international commerce, it doesn't have a monopoly. French is spoken in many of its former colonies and remains the second language in international diplomacy. As for Spanish, it is spoken not only in Latin America, but also in the United states. Thus, our trilingual footnote will be accessible in languages that are known at least passively by the immense majority of the merchants and lawyers of the world. It is a great strength.

Second, the Louisiana Civil Code has the quality of neutrality. I mean that it possesses this dose of universalism that is necessary to be adapted in different places and cultures. Jurists accustomed to the French legal culture feel at home when they delve into the Louisiana civil code, even if its language is English. But this impression of *déjà vu* is starkly nuanced by the presence of truly distinctive pieces that awaken deep interest; all the reforms of the past decades have borrowed from a variety of legal traditions: German law, Dutch law,

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33. Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 (1991).

34. Wolfgang Wiegand, *Americanization of Law: Reception or Convergence?* in LEGAL CULTURE AND THE LEGAL PROFESSION 137 (Lawrence M. Friedman & Harry N. Scheiber eds., Westview Press 1996); *see* the volume *L'américanisation du droit*, 45 ARCHIVES DE PHILOSOPHIE DU DROIT (2001).

35. Nedim Peter Vogt, *Anglo-Internationalisation of Law and Language: English as the Language of Law*, 29 INT'L LEGAL PRAC. 112 (2004).

36. Barbara J. Beveridge, *Legal English—How it Developed and Why It is Not Appropriate for International Commercial Contracts* in THE DEVELOPMENT OF LEGAL LANGUAGE 55, 63 (Heikki E. S. Mattila ed., Helsinki: Kauppakaari 2002). Also available online at http://www.tradulex.com/articles/Beveridge.pdf.

37. *See* Olivier Moréteau, *Can English Become the Common Legal Language in Europe?* in COMMON PRINCIPLES OF EUROPEAN PRIVATE LAW 405 (R. Schulze & G. Ajani eds., 2003).

common law, etc. The result, which some of you may regret, is that the Louisiana civil code is less French; but this loss is compensated by a huge gain: it has evolved into an *authentically* European code. As the *only genuine* European Civil Code, the Louisiana Civil Code is very suitable for cross-cultural relations. This is why European jurists should absolutely draw from the experiment from their Louisiana colleagues to build a truly European Code, if they really want to get one.[38] This is also the reason why partners of a contract could choose Louisiana law as a "neutral" *lex contractus*.

Because of my lack of time, I will only give two examples, one concerning the law of obligations, the other concerning conflict of laws.

### *B. Two Examples of Marketable Provisions*

Let's begin with article 1967, which introduced the concept of promissory estoppel in Louisiana law,[39] without revolutionizing it.[40]

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38. Mathias Reimann, *Towards A European Civil Code: Why Continental Jurists Should Consult Their Transatlantic Colleagues*, 73 TUL. L. REV. 1337, 1341 *s.* (1999).

39. In the case of *Ducote v. Oden* (221 La. 228, 59 So.2d 130 [1952]), the Louisiana Supreme Court held that promissory estoppel was unknown to Louisiana law. This remained *jurisprudence constante* until the enactment of art. 1967. It seems that there was no need for Louisiana courts to resort to the doctrine of promissory estoppel. General provisions of the Civil Code relating to contract, quasi-delict and delict provided solutions to the questions that were solved with promissory estoppel in common law jurisdictions: Federick H. Sutherland, *Promissory Estoppel and Louisiana*, 31 LA. L. REV. 84 (1970). For the theoretical foundations and the genesis of the new provision, see Shael Herman, *Detrimental Reliance in Louisiana Law—Past, Present, and Future: The Code Drafter's Perspective*, 58 TUL. L. REV. 707 (1984); Mohamed Y. Mattar, *Promissory Estoppel: Common Law Wine in Civil Law Bottles*, 4 TUL. CIV. L.F. 71 (1988); *See also* Jon C. Adock, *Detrimental Reliance*, 45 LA. L. REV. 753, 762 (1985) (discussing the nature of "detrimental reliance," and how it does not harmonize well with the civilian theory of contracts); David D. Snyder, *Comparative Law in Action: Promissory Estoppel, The Civil Law and The Mixed Jurisdiction* in LOUISIANA: MICROCOSM OF A MIXED JURISDICTION, 235, 273 *et seq.* (Vernon Valentine Palmer ed., 1999) (analyzing the cases rendered before and after the enactment of art. 1967 and showing that the majority of the courts adheres to the contractual theory).

40. In Louisiana, the doctrine of "detrimental reliance" under Civil Code article 1967 raises some concerns, at least in the field of extinctive prescription.

This article finds itself in a chapter entitled "Cause," in Title IV "Conventional Obligations or Contracts," of Book Three "Modes of

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While it is reasonable to consider detrimental reliance as a "personal action" subject to a ten-year prescriptive period, it is also reasonable to consider it a delictual obligation subject to a one-year prescriptive period. *See* Simmons v. Sowela Technical Institute, 470 So. 2d 913, 923–24 (La. App. 3 Cir. 1985) (regarding detrimental reliance as both delictual and contractual in nature). Given the nature of the cause of detrimental reliance, some Louisiana courts have suggested that such a cause of action is imprescriptible. *See generally* Babkow v. Morris Bart, P.L.C., 726 So. 2d 423, 429 (La. App. 4 Cir. 1998) (citing *Fontenot v. Houston General Insurance Co.*, 467 So. 2d 77 (La. App. 3 Cir. 1985) wherein the court regarded statements that lull the plaintiff into a "false sense of security" estopped the defendant from pleading prescription). David v. Snyder, *Hunting Promissory Estoppel* in MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND 316–17 (Vernon V. Palmer & Elspeth Reid eds., 2009) (sustaining that, despite the location of art. 1967, Louisiana promissory estoppel has solid delictual roots). The Fifth Circuit Court of Appeals adopted a dualist approach:

> Turning to the merits of this issue, the answer to this question turns on whether these two claims are viewed as contractual in nature-and thus governed by the ten-year period-or delictual in nature-and thus governed by the one-year period The question seems simple, but the answer is more complex. We have applied both statutes to claims denominated as "detrimental reliance" because the nature of the action, rather than its label, governs which statute applies. *Compare Copeland v. Wasserstein, Perella & Co.*, 278 F.3d 472, 479 (5th Cir. 2002) (applying one-year statute), *with Stokes v. Georgia-Pacific Corp.*, 894 F.2d 764, 770 (5th Cir. 1990) (applying ten-year statute). In other words, "[w]hen evaluating which prescriptive period is applicable to a cause of action, courts first look to the character of the action disclosed in the pleadings." *SS v. State*, 831 So.2d 926, 931 (La. 2002). We conclude that Keenan's detrimental reliance and promissory estoppel claims derive from a breach of promise, like *Stokes*, rather than a breach of duty, like *Copeland* (footnotes omitted): Keenan v. Donaldson Lufkin & Jenrette, Inc., 575 F.3d 483, 487–8 (5th Cir. 2009).

This approach has been confirmed in a recent case:

> Detrimental reliance claims based in contract are subject to a ten-year prescriptive period. *First La. Bank v. Morris & Dickson, Co., LLC,* 45,668 (La. App. 2 Cir. 11/3/10), 55 So.3d 815. Furthermore, a promisor who lulls the promisee into a false sense of security that an action will be taken cannot avail itself of claim of prescription. *Babkow v. Morris Bart, P.L.C.,* 98–256 (La. App. 4 Cir. 12/16/98), 726 So.2d 423; *Fontenot v. Houston Gen. Ins. Co.*, 467 So.2d 77 (La. App. 3 Cir.1985). Although we find the ten-year prescriptive period applicable to MCGC's claims, these circumstances are ones in which estoppel would lie as DHH's repeated promises to MCGC that it would investigate and enforce its code induced Cormier into abandoning his original lawsuit. DHH's multiple failures to do as it promised over many years would justify it being estopped from claiming that MCGC's action is prescribed (footnote omitted): Murphy Cormier General Contractor, Inc. v. State, Dept. of Health & Hospitals,114 So.3d 567, 598–99 (La. App. 3 Cir., 2013).

Acquiring Ownership of things." This chapter starts with article 1966: "An obligation cannot exist without a lawful cause," a provision that is in the straight line of the French civil tradition. The following article gives a simple definition of the cause: "Cause is the reason why a party obligates himself."[41] Until now, there is nothing new under the sun. But let's look at the lengthy second paragraph of this article: "A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying." This article is remarkable: first, it preserves a notion to which many of my French colleagues are viscerally attached, quasi enamored: *la cause*. Second, this paragraph codifies a genuinely common law concept known as 'detrimental reliance,' or 'equitable estoppel.' The La. C.C. clearly illustrates how the concepts are intellectually linked and bridges the divide between the civil law and the common law. But that is not all; the provision provides a very flexible solution to sanction the breach of detrimental reliance, adding that: "recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise." In other words, "a court may grant damages, rather than specific performance, to the disappointed promise, and may even limit damages thus granted to the expenses actually incurred …."[42]

This possible choice between specific performance, a typically civilian remedy, and damages, a remedy generally preferred in common law systems, is another value of this provision. And, as a last argument, what a wonderful illustration that "codificatory" doesn't necessarily rhyme with "rigidity:" With this "civilized" form of detrimental reliance, the judge has a tool that enables him to take every factual and legal element of the case in consideration, and after having weighed all the relevant interests, to adopt the fairest solution. The introduction of such a provision in the French Code civil would

41. Art. 1967 La. C. C.
42. Comment (e) under art. 1967.

put some order in the nascent French case-law on promissory estoppel.[43]

Now I would like to evoke a topic highly debated in the U.S. and in Europe: punitive damages. Louisiana is proudly aligned with modern Continental European legal systems in excluding punitive damages as incompatible with the purpose of the law of damages: to "repair the harm sustained by the victim of a wrong, and not to punish the wrongdoer."[44] Louisiana lawmakers, courts, and scholars generally regard the rejection of punitive damages as an important point of contact with the modern civil law world, and as a point of departure from its common law neighbors. Given that the law of almost every

43. In France, the last decades have seen the emergence of new sources of obligation of a doubtful nature: letters of intent, gentlemen's agreements, "quasi-contracts of lottery," and "unilateral promises" without contract (*engagement unilatéral de volonté*). These sources of obligation have strong connections with the concept of detrimental reliance (the long-term distribution relations being one of the oldest situations where legitimate expectations are protected without resorting to contract). *See* FRANÇOIS-XAVIER LICARI, LA PROTECTION DU DISTRIBUTEUR INTÉGRÉ EN DROIT FRANÇAIS ET ALLEMAND 513, 517 *et seq.* (2002). The concept of detrimental reliance or promissory estoppel is slowly growing in French Law from the fertile soil of the duty of good faith: C. CIV. [Fr.] art. 1134 § 3. But *see* Christian Larroumet, *Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law*, 60 TUL. L. REV, 1209, 1224 (1986) (asserting the superfluity of promissory estoppel in a civil law system). The terminology itself lacks firmness (*principe de cohérence, estoppel, interdiction de se contredire au détriment d'autrui, protection de la confiance légitime*, etc.). Furthermore, its exact nature and scope need clarification. *See* Horatia Muir Watt, *Pour l'accueil de l'estoppel en droit privé français* in MÉLANGES EN L'HONNEUR DE YVON LOUSSOUARN 303 (1994); BERTRAND FAGES, LE COMPORTEMENT DU CONTRACTANT n° 630 (P.U.A.M. 1997); Jean Calais-Auloy, *L'attente légitime, une nouvelle source de droit subjectif?* in MÉLANGES EN L'HONNEUR DE YVES GUYON 171 (2003); Sophie Alexane, *Le principe de protection de la confiance légitime peut-il se passer d'un préjudice?*, 2005 REVUE DE DROIT DES AFFAIRES DE L'UNIVERSITÉ PANTHÉON-ASSAS 249; Bénédicte Fauvarque-Cosson, *L'estoppel, concept étrange et pénétrant*, REVUE DES CONTRATS 1279 (2006); Denis Mazeaud, *La confiance légitime et l'estoppel – Rapport français* in LA CONFIANCE LÉGITIME ET L'ESTOPPEL 247 (B. Fauvarque-Cosson ed., Société de législation comparées 2007); Pierre-Yves Gauthier, *Confiance légitime, obligation de loyauté et devoir de cohérence: identité ou lien de filiation?* in VALÉRIE-LAURE BÉNABOU & MURIEL CHAGNY, LA CONFIANCE EN DROIT PRIVÉ DES CONTRATS 109 (2008).

44. Saúl Litvinoff, § 7.6 in 6 LOUISIANA CIVIL LAW TREATISE 205 (2d. ed. 1999); 7 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 184 (2d ed. 1954); John W. deGravelles & J. Neale deGravelles, *Louisiana Punitive Damages—A Conflict of Traditions*, 70 LA. L. REV. (2000).

U.S. state as well as a number of U.S. federal laws share a general acceptance of punitive damages, one might dismiss the Louisiana exception as yet another example of diversity that uniquely characterizes the U.S. legal landscape, and of the delicate balance of American federalism. But for the same reason that globalization has forced courts in Continental civil law systems to consider punitive damages in the context of conflicts of laws,[45] Louisiana courts are often required to apply and review foreign laws that are repugnant to its *ordre public*, or public policy. In this sense, the European experience in a shrinking world, where incompatible legal principles cause friction, is something with which the small jurisdiction of Louisiana is historically familiar. And how Louisiana resolves the conflict of values between the common law world and the civil law world is worth meditating. Louisiana Civil Code article 3546 is the relevant provision for conflicts of laws in the field of punitive damages. The creation of Article 3546 was the first known attempt to draft a conflicts rule specifically tailored to punitive damages:

> Article 3546: Punitive Damages
> Punitive damages may not be awarded by a court of this state unless authorized:
> (1) By the law of the state where the injurious conduct occurred and by either the law of the state where the resulting injury occurred or the law of the place where the person whose conduct caused the injury was domiciled; or
> (2) By the law of the state in which the injury occurred and by the law of the state where the person whose conduct caused the injury was domiciled.

These examples of successful symbiosis or conciliation between common law and civil law could be multiplied *ad infinitum*.[46] They

45. *See* Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 LA. L. REV. 529 (2010); Ronald A. Brand, *Punitive Damages and the Recognition of Judgments*, 43 NILR 143 (1996); Benjamin West Janke & François-Xavier Licari, *Enforcing Punitive Damage Awards in France after* Fountaine Pajot, 60 AM. J. COMP. L. 775 (2012).

46. For other examples, *see* Joachim Zekoll, *The Louisiana Private-Law System: The Best of Both Worlds*, 10 TUL. EUR. & CIV. L.F. 1, 13–27 (1995).

are the vibrant illustration of what the Hon. Jean-Louis Beaudouin expressed here, at LSU in 2003 during a symposium entitled "Louisiana Bicentenary: A Fusion of Legal Culture 1803–2003:"

> *Les pays comme la Louisiane et le Québec qui ont eu l'occasion de vivre les deux traditions et donc d'avoir à leur endroit une vision critique, ont eux réussi à assimiler les éléments essentiels de ces deux grandes cultures. C'est pourquoi, à mon avis, ils peuvent servir d'exemple et de modèle de bijuridisme authentique et concret*.[47]

Now it's time to conclude. In 1986, a Louisiana colleague noted: "… we would hope that the rest of the Union would stop treating Louisiana civil law as the Cinderella of American law and show a greater willingness to consider some of the good ideas that emanate from our civil code."[48] Today, I have tried to point the serious likelihood that our cherished Cinderella may turn into a Princess; our host may be the good fairy she was waiting for.

47. Jean-Louis Beaudouin, *Systèmes de droit mixte : un modèle pour le 21e siècle ?*, 63 LA. L. REV. 993, 998 (2003).

48. Christopher Osakwe, *Introduction—Louisiana Civil Law: The Cinderella of American Law*, 60 TUL. L. REV. 1105, 1117 (1986).